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No. 97-1690

In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
PETITIONERS

v.

JOSEPH G. DILEONARDI, UNITED STATES MARSHAL
FOR THE NORTHERN DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Government of Canada has applied for extradition of petitioners, who attempted to remove a disabled Canadian citizen from Canada against her will at the behest of her husband, whom an Illinois state court appointed as her guardian.

The question presented is whether Canada's charge of kidnapping would violate the dual criminality requirement of the extradition treaty between the United States and Canada.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 125 F.3d 1110. The opinion of the district court (Pet. App. 12a-33a) is reported at 941 F. Supp. 741. The opinion of the magistrate judge (Pet. App. 34a-83a) is reported at 881 F. Supp. 1126.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1997 (Pet. App. 84a). A petition for rehearing was denied on November 26, 1997 (Pet. App. 84a). On January 27, 1998, Justice Stevens granted an

extension of time until April 15, 1998, to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves an extradition request for petitioners presented by the Government of Canada to the United States. A magistrate judge in the United States District Court for the Northern District of Illinois certified that petitioners were subject to extradition under the applicable treaty. Pet. App. 34a-83a. Subsequently, the district court granted petitioners' application for a writ of habeas corpus barring their extradition. *Id.* at 12a-33a. The court of appeals reversed. *Id.* at 1a-11a.

1. In December 1987, Tammy DeSilva, a citizen of Canada, and her husband, Anthony DeSilva, were involved in an automobile accident in Monee, Illinois, that rendered Tammy a quadriplegic and caused her severe brain damage. Three months after the accident, an Illinois court appointed her husband as her guardian. In July 1989, Anthony moved Tammy from their home in Illinois to a house the couple owned in Winnipeg, Canada, so that she could receive government-subsidized health care. In Winnipeg, Tammy's parents, Ernest and Christina Wright, cared for her. Pet. App. 1a-2a, 13a.

In the meantime, in June 1988, Anthony DeSilva initiated a lawsuit in Cook County, Illinois, against the driver and owner of the other vehicle involved in the accident that caused Tammy's injuries. That litigation required Tammy to undergo a medical examination. Because Anthony feared that the Wrights would not allow Tammy to return to the

United States for the examination, Anthony secured an order from the Cook County court authorizing him "to take custody of the person of Tammy DeSilva, wherever she may be found, for the purpose of presenting her to a physician or medical care provider for evaluation, treatment, or assessment." Pet. App. 2a, 36a-37a.

Anthony DeSilva then enlisted petitioners, who are Chicago police officers, and Judith Schon, a nurse, to accompany him to the house in Winnipeg where Tammy was staying with her parents. At 6:40 a.m. on February 3, 1992, this group arrived at the Winnipeg home. There, Anthony and his companions carried Tammy to the car, leaving behind the computer device she used to communicate and all her clothing. They then drove back toward the border. After they left, Tammy's mother, Christina Wright, called the police and reported that Tammy had been abducted. Pet. App. 2a, 41a-45a.

Alerted to the police report, United States Customs officials stopped the group at the border. Because Tammy did not have her computer communication device, she could only communicate by nodding her head. In response to questions from Customs officials, Tammy indicated that she was afraid, that she was being taken against her will, and that she wanted to go back to Canada. Pet. App. 44a. A short time later, Canadian law enforcement officers arrived with Tammy's communication device. During further questioning, Tammy stated through the device that she wanted to go home to Winnipeg with Anthony, but that she did not want to go to Chicago. When then asked whether she wanted to be with Anthony or her mother, she replied that she wanted to be with her mother. She also told the Customs officers that

Anthony had told her that morning that he was taking her for a ride, but did not say where. *Id.* at 45a. After interviewing petitioners and Anthony DeSilva, Customs officials sent Tammy back to Canada and allowed DeSilva, petitioners, and Schon to return to the United States. *Id.* at 2a-3a, 46a.

2. The Province of Manitoba, Canada, charged Anthony DeSilva, petitioners, and Schon with kidnapping and forcible seizure. The Canadian government then made a formal request under the extradition treaty between the two countries for petitioners', DeSilva's and Schon's, extradition. Pet. App. 17a. That treaty requires in part that the offense on which extradition is sought must be "conduct which constitutes an offense punishable by the laws" of both countries. *Id.* at 50a. See Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 985; Protocol Amending the Treaty on Extradition, Jan. 11, 1988, U.S.-Can., 27 I.L.M. 423.

A magistrate judge in the Northern District of Illinois found that petitioners and Anthony DeSilva were subject to extradition under the treaty. Pet. App. 34a-83a. The magistrate judge first found that the offenses on which Canada sought extradition were punishable as kidnapping under both federal and Illinois law. *Id.* at 52a-53a. The magistrate judge rejected petitioners' contention that because Anthony DeSilva was Tammy's guardian, his actions would have been lawful in Illinois and thus that the extradition request failed to satisfy the requirement of dual criminality. The magistrate judge acknowledged that had the events in question occurred wholly in Illinois, Anthony DeSilva would not have committed a crime, because Illinois law expressly provides that the consent of a legal guardian is an absolute defense to a

kidnapping charge. The court held, however, that the proper inquiry under the dual criminality provision of the treaty is whether a person appointed as a legal guardian in Canada would violate Illinois kidnapping law by abducting his ward from Illinois and attempting to transport her to another country. *Id.* at 56a.

After analyzing Illinois law, the magistrate judge held that "[w]hile an Illinois court might defer to a Canadian guardianship appointment as a matter of comity, and an Illinois prosecutor might decline to prosecute kidnapping charges against a foreign guardian in these circumstances, these are discretionary determinations." Pet. App. 60a. Thus, because a foreign guardianship order would not be an "absolute bar to criminal proceedings," petitioners' and DeSilva's conduct would be "punishable" under Illinois law within the meaning of the extradition treaty. *Ibid.*

The magistrate judge also held that the extradition request established probable cause to believe that DeSilva and petitioners had committed kidnapping. In particular, the magistrate judge found sufficient evidence that Tammy DeSilva was confined and transported against her will and that she was transported without legal authority. Pet. App. 62a-70a. The magistrate judge found, however, that the extradition request did not show probable cause for the extradition of the nurse, Judith Schon. *Id.* at 82a.

3. Petitioners and DeSilva then filed a petition for habeas corpus challenging their extradition.[1] The

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[1] While proceedings on the extradition request were pending in the Northern District of Illinois, petitioners filed an original action in the United States District Court for the District of Columbia challenging the constitutionality of the extra-

district court granted the petition. Pet. App. 12a-33a. The court held that the extradition request failed to satisfy the "dual criminality" treaty requirement that the conduct at issue must be "an offense punishable by the laws" of both the United States and Canada. *Id.* at 18a. In particular, the district court disagreed with the magistrate judge over the effect that Illinois courts would accord to a Canadian guardianship order. The district court explained that "Illinois would recognize a valid Canadian guardianship, and so a Canadian guardian—like an Illinois guardian—would be incapable of kidnapping his ward from Illinois. Thus, since the guardians' conduct would not be criminal in Illinois, the dual criminality requirement of the Treaty is not met." *Id.* at 33a.

4. The court of appeals reversed. Pet. App. 1a-11a. The court expressed "doubt that Illinois would look with equanimity on someone who tried to remove a disabled person from the state to a foreign country, on the basis of an ex parte order issued by a foreign judge purporting to authorize acts within the territory of the United States—or for that matter on the basis of a guardianship proceeding from which U.S. citizens were automatically excluded." *Id.* at 7a.[2]

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dition statute, 18 U.S.C. 3184. The district court held that Section 3184 violates Article III of the Constitution and enjoined its application to petitioners. *LoBue* v. *Christopher*, 893 F. Supp. 65 (D.D.C. 1995). The court of appeals reversed without reaching the merits, finding instead that the district court lacked jurisdiction to hear petitioners' constitutional challenge. 82 F.3d 1081 (D.C. Cir. 1996).

[2] Petitioners contest (Pet. 8-9 & n.3) the court of appeals' suggestion that Anthony's guardianship order was somehow flawed, but as they concede (Pet. 9 n.3), this statement is "dictum."

The court did not decide that issue, however; instead, it found that the dual criminality requirement was satisfied because the conduct alleged in the extradition request violated the federal kidnapping statute, 18 U.S.C. 1201(a). Under that statute, the court held, the only issue was whether Tammy DeSilva was an "unconsenting person." Pet. App. 8a.

Relying on *Chatwin* v. *United States*, 326 U.S. 455 (1946), the court rejected petitioners' arguments that as Tammy's guardian, Anthony could consent on Tammy's behalf and that Tammy's incapacitation prevented her from having sufficient will to withhold consent. Under *Chatwin*, the court held, a federal court in a kidnapping prosecution "must decide whether the alleged victim was competent to exercise a rational will"; the State's decision to appoint a guardian is not conclusive of that issue. Here, the court concluded, the magistrate judge had found that the evidence submitted would permit a rational trier of fact to conclude that Tammy could exercise a rational will, and that she communicated a desire to remain in Winnipeg. Pet. App. 9a. The court also noted that, although the kidnapping statute contains an exception for minors abducted by their parents, it contains no exception for wards abducted by their guardians. *Id.* at 10a. The court concluded that "[a] guardian who moves an adult ward across state or national boundaries, against her will, * * * may be convicted of kidnapping." *Id.* at 10a-11a.

ARGUMENT

Petitioners contend (Pet. 10-30) that the court of appeals erred in rejecting their claim that as a matter of law they could not be convicted of kidnapping because Anthony DeSilva was Tammy DeSilva's guard-

ian. In particular, they argue first that the court of appeals erred in not deferring to the Illinois state court's determination that Tammy was incompetent, and second that, in any event, a legal guardian is exempt from liability under the federal kidnapping statute for abducting his ward. Neither contention merits review.

1. The extradition treaty between the United States and Canada provides in pertinent part that "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of both [the United States and Canada] by imprisonment or other form of detention for a term exceeding one year or any greater punishment." 27 I.L.M. at 423. That requirement, known as "dual criminality," requires the nation requesting extradition to show that the conduct that forms the basis for the extradition request is unlawful under federal law, the law of the state where the accused is found, or the law in a preponderance of states. See *Wright* v. *Henkel*, 190 U.S. 40, 61 (1903); *Cucuzzella* v. *Keliikoa*, 638 F.2d 105, 107 (9th Cir. 1981).

In this case, as the court of appeals concluded, petitioners' alleged conduct would violate the federal kidnapping law and thus supports petitioners' extradition to Canada. Pet. App. 10a-11a. The federal kidnapping statute provides in part as follows:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by a parent thereof, when—(1) the person is willfully transported in interstate or foreign commerce; * * *

> shall be punished by imprisonment for any term of years or for life.

18 U.S.C. 1201(a). To establish a violation of this statute, the government must prove that a defendant (1) willfully transported in interstate commerce (2) an unconsenting person (3) who is held for ransom, reward, or otherwise. Pet. App. 82a; see *United States* v. *Lewis*, 115 F.3d 1531, 1535 (11th Cir. 1997), cert. denied, 118 S. Ct. 733 (1998); *United States* v. *Osborne*, 68 F.3d 94, 100 (5th Cir. 1995).

Petitioners contend that Tammy DeSilva was not an unconsenting person because the State of Illinois had determined that she was "incapable of having a recognizable will" and thus that she could not withhold consent. Pet. 13-14. They assert (*ibid*) that the court of appeals erred in holding that state law is of "no weight in resolving [the] issue of whether the alleged victim in a kidnapping case is of such age or mental state as to be incapable of having a recognizable will." That contention misapprehends both this Court's decision in *Chatwin* and the court of appeals' decision here.

In *Chatwin*, the defendants were convicted of kidnapping based on their transportation across state and international borders of a 15-year-old girl whom the parties stipulated had "a mental age of 7." 326 U.S. at 457. The Court reversed the conviction in part because "there [was] no competent or substantial proof that the girl was of such an age or mentality as necessarily to preclude her from * * * exercising her own free will, thereby making the will of her parents or the juvenile court authorities [which had taken custody of the girl prior to the kidnapping] the important factor." *Id.* at 461. In explaining this con-

clusion, the Court stated that it could not find as a matter of law or statutory interpretation that the girl was mentally incapable "in view of the general rule that incapacity is to be presumed only where a child is under the age of 14." *Ibid.* The Court also noted "parenthetically" that the law in the girl's state of residence, Utah, considered the consent of anyone over the age of 12 to be a defense to kidnapping. *Ibid.*

Finally, the Court rejected the government's argument that the girl's inability to consent had been shown by the fact that testing of the girl showed that she had a mental age of seven. The Court found "a complete absence of proof in the record as to the proper weight and significance to be attached to this particular mental age." 326 U.S. at 462. Thus, under the federal kidnapping statute, when the victim has been abducted from a legal guardian, "[t]here must be competent proof beyond a reasonable doubt of a victim's mental incapacity in relation to the very acts in question before criminal liability can be sanctioned in a case of this nature." *Ibid.*

In *Chatwin*, the victim's legal guardian claimed the right to withhold consent on behalf of the victim; here DeSilva claims the right to grant consent on behalf of the alleged victim. That distinction is irrelevant, however, to the dual criminality inquiry. *Chatwin* makes clear that even when an alleged victim has a legal guardian, the question whether the victim consented to interstate or international transportation remains a factual element of the offense. Although evidence that a State has appointed a guardian for the victim or that the victim has been found incompetent may be admissible and probative on that issue, it is not conclusive where, as here, there is other evidence from which a jury can find that the

victim did not consent. Here, as the court of appeals summarized, the evidence in the record could support a conclusion that "[Tammy] resisted Anthony when he took her from her home, and that she communicated intelligibly and rationally with U.S. customs officials when they asked her to choose between returning to Winnipeg or traveling with Anthony to Chicago." Pet. App. 9a. In such cases, *Chatwin* makes clear that a legal guardian can be convicted of kidnapping under the federal statute. Therefore, a jury could have found that DeSilva's and petitioners' conduct violated the federal kidnapping statute if it had occurred in the United States, and the dual criminality requirement has been satisfied.

Petitioners further argue (Pet. 16-18) that the court of appeals' interpretation of the federal kidnapping statute conflicts with decisions of the Eighth and Tenth Circuits, which, they assert, follow state family law. See *United States* v. *McCabe*, 812 F.2d 1060 (8th Cir.), cert. denied, 484 U.S. 832 (1987); *United States* v. *Floyd*, 81 F.3d 1517 (10th Cir.), cert. denied, 117 S. Ct. 144 (1996). Neither case supports that contention. In *McCabe*, the kidnapping victim was a 23-month-old infant, and the court of appeals rejected the defendant's contention that the government had failed to prove that the child lacked a "recognizable will." 812 F.2d at 1061. Contrary to petitioners' characterization, however, the court of appeals did not rely on state law to reach that conclusion; indeed, the court's discussion of that issue does not mention the law of the State where the kidnapping occurred. Instead, the court relied on this Court's statement in *Chatwin* that children under a certain age are presumed not to have a recognizable will. *Ibid.*

Floyd is even farther afield. In that case, the defendant claimed that he could not be guilty of kidnapping because he was the victim's "surrogate parent" and thus fell within the kidnapping statute's exception for parents who kidnap their minor children. 81 F.3d at 1520. The court held that a "surrogate parent" was immune from criminal liability under the statute, but it found that as a factual matter, the defendant was not a "surrogate parent" to the victim at the time the kidnapping occurred. To reach that conclusion, the court relied in part on the fact that the defendant had "voluntarily relinquished custody" of the child to the Oklahoma Department of Human Services, *id.* at 1524, but the court never looked to Oklahoma law to determine the defendant's status as a parent. *Id.* at 1519-1527.

2. Petitioners also contend (Pet. 18-21) that the dual criminality requirement cannot be satisfied in this case because the federal kidnapping statute does not prohibit the abduction of a person by that person's legal guardian. Petitioners argue that the statute's exemption of parents from liability for kidnapping their minor children includes an exemption for those who stand in loco parentis, which in turn includes a further exemption for legal guardians. Pet. 19.

The short answer to petitioners' contention is that the language of the statute contains no exception for legal guardians who abduct their adult wards. If Congress had wished to include such an exemption, it could easily have done so, but the court of appeals was not free to read such an exemption into the statute to satisfy petitioners' conception of appropriate policy.

See *Commissioner* v. *Lundy*, 516 U.S. 235, 252 (1996); *United States* v. *Yermian*, 468 U.S. 63, 73 n.13 (1984).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1998

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[3] Petitioners assert (Pet. 20) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *Floyd*, which interpreted the word "parent" in the statute to include those who stood in loco parentis to a minor. Whatever the merits of that decision, it cannot be read to hold or suggest that the word "parent" includes legal guardians and that the word "minor" includes adults adjudged incompetent. Both words would have to be defined in that way for petitioners' contention to prevail.